

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELIX WADE,

Defendant.

NO. CR-06-6020-LRS

**ORDER DENYING DEFENDANT'S  
MOTION TO RECONSIDER ORDER  
DENYING NEW TRIAL**

The Defendant was been convicted of Possession of a Firearm by A Prohibited Person, in violation of 18 U.S.C. § 922(g)(1). On September 1, 2006 the Court issued an Order Denying Defendant's Motion for a New Trial. This matter comes before the Court on Defendant's Motion to Reconsider Order Denying New Trial (Ct. Rec. 120) filed December 21, 2006. After reconsideration of the written record, the testimony of the witnesses, and argument by counsel, the Court issues this order denying Defendant's motion to reconsider the Court's Order dated September 1, 2006 (Ct. Rec. 88) for the reasons enumerated below.

**I. Legal Standard**

"A district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal. *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir.1992). "The court

1 is not obliged to view the evidence in the light most favorable to the  
2 verdict, and it is free to weigh the evidence and evaluate for itself the  
3 credibility of the witnesses." *United States v. Kellington*, 217 F.3d  
4 1084, 1097 (9th Cir.2000). Thus, "[i]f the court concludes that, despite  
5 the abstract sufficiency of the evidence to sustain the verdict, the  
6 evidence preponderates sufficiently heavily against the verdict that a  
7 serious miscarriage of justice may have occurred, it may set aside the  
8 verdict, grant a new trial, and submit the issues for determination by  
9 another jury." *Kellington*, 217 F.3d at 1097 (quoting *United States v.*  
10 *Lincoln*, 630 F.2d 1313, 1319 (8th Cir.1980)).

11  
12 The Court concludes that the evidence does not preponderate  
13 sufficiently heavily against the verdict to suggest a serious miscarriage  
14 of justice may have occurred. This case has been properly tried and the  
15 jury's verdict is supported by substantial evidence.

## 16 **II. Discussion**

17 The government first points out that the current motion resembles  
18 a second motion for a new trial. As a motion for a new trial, the  
19 government asserts that it is well beyond seven days from a finding of  
20 guilt and, as such, untimely.

21 Defendant's motion expands the issues earlier asserted in support  
22 of his request for a new trial. While a motion for reconsideration is  
23 not a vehicle to reargue a motion or to present evidence which should  
24 have been raised before, the Court will briefly discuss the allegations  
25 of error which Defendant claims would warrant the grant of a new trial.  
26

1 The Court concludes that Defendant has not set forth any facts or law of  
2 a strongly convincing nature to induce this Court to reverse its prior  
3 decision.

4 **1. Prosecutorial Misconduct and Improper Comments**

5 Defendant argues, through new counsel<sup>1</sup> appointed on September 21,  
6 2006, he is entitled to a new trial because of "numerous improper  
7 examples of prosecutorial misconduct." Ct. Rec. 121, at 1. More  
8 specifically, Defendant states that the Assistant United States Attorney  
9 improperly made comments to arouse the passions and prejudices of the  
10 jury as well as shift the burden of proof. Ct. Rec. 121 at 2. The  
11 Defendant asserts that the prosecutor made excuses for the government's  
12 failure to meet its burden re: lack of Defendant Wade's print on the  
13 weapon, by stating the resources were going to Iraq. Defendant also  
14 asserts that the government argued for a lessened burden by improperly  
15 attacking defense counsel during closing with regard to counsel's chart  
16 of legal standards and its misrepresentation of the elements of proof.  
17 Further, Defendant argues again that the government vouched for Officer  
18 Aparicio's credibility when the prosecutor told the jury his testimony  
19 was consistent and that he was a credible witness. Id.

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23 <sup>1</sup>On September 12, 2006, after the Court denied Defendant's Motion  
24 for New Trial, defense trial counsel filed a motion to withdraw from the  
25 case. In that motion, trial counsel stated the defendant sent him a  
26 letter requesting that he stop all work on the case.

1 The Court notes that as to defense counsel's chart of legal  
2 standards, defense counsel objected to the government's comment in  
3 rebuttal argument, and the Court sustained the objection. Despite  
4 Defendant's suggestion that the prosecutor attacked the credibility of  
5 defense counsel and told the jury not to trust defense counsel, the Court  
6 does not find in the record that the prosecutor told the jury not to  
7 trust defense counsel or acted in an inappropriate manner as Defendant  
8 suggests. The Court cannot conclude that comments made by government  
9 counsel rose to the level of legal prejudice precluding a fair trial in  
10 this case.  
11

12 Defendant's re-argument that the prosecutor improperly vouched for  
13 or attempted to bolster the testimony of a government witness in  
14 arguments to the jury is not convincing. "Vouching occurs when the  
15 prosecutor indicates a personal belief in the credibility or honesty of  
16 a witness; bolstering is an implication by the government that the  
17 testimony of a witness is corroborated by evidence known to the  
18 government but not known to the jury." *U.S. v. Sanchez*, 118 F.3d 192, 198  
19 (4<sup>th</sup> Cir. 1997). The Court finds that the Assistant United States  
20 Attorney who tried this case did not "vouch" for the witness Officer  
21 Aparicio for reasons enumerated in its order denying defendant's first  
22 motion for a new trial. See Ct. Rec. 88, pages 2 & 3.  
23

24 Defendant additionally suggests that the government did not disclose  
25 all *Brady* materials in this case and that the government opposed the  
26 gathering of new evidence. More specifically, defendant asserts that the

1 government refused to release palm print exemplars, cartridge and  
2 ammunition and in doing so engaged in prosecutorial misconduct.

3       The Court does not find any prosecutorial misconduct with respect  
4 to the release of these items. After completion of trial, on December  
5 5, 2006, the defendant filed a motion to compel the government to release  
6 the firearm, cartridge and ammunition. On December 21, 2006, the Court  
7 denied the defendant's motion. Ct. Rec. 119. The government maintains  
8 that the defendant was previously provided with all of the government's  
9 evidence in this case. Based on these representations and the Court's  
10 consideration of defendant's motion to compel, the Court does not find  
11 defendant's argument with respect to "new evidence" compelling, nor can  
12 defendant point to information suggesting that a different disposition  
13 should occur. The jury was fully informed by stipulation at trial that  
14 palm prints on the gun were not the defendant's thereby allowing him to  
15 argue that he could not have possessed the weapon. Defendant also had  
16 the full ability to claim that the government's failure to provide  
17 inculpatory print information or DNA from the magazine and bullets  
18 mitigated against a finding that the defendant had possessed the gun.  
19

## 20       **2. Choice of Counsel**

21       Defendant's new argument that he was deprived of his choice of  
22 counsel also must fail. The transcript unequivocally indicates that the  
23 defendant was given additional time to speak with his attorney prior to  
24 the start of trial. After a recess, defense counsel stated that  
25 defendant requested he continue his representation. When the Court  
26

1 specifically inquired whether or not the defendant wanted Mr. Trejo to  
2 represent him, the defendant replied:

3       Yeah, we resolved our differences, I feel that Mr. Trejo will do his  
4       best to represent me at his fullest, and I am prepared to go on with  
5       the trial.

6 Verbatim Report of Proceedings (7/24/06) at 13.

7 Based on defendant's own statements, it can hardly be said that he was  
8 deprived of his right to counsel of choice.

9       Defendant argues that the single reference to the defendant's desire  
10      to "plead the Fifth" in conjunction with jury instruction #6 prejudiced  
11      him. The Court respectfully disagrees based on the curative instruction  
12      to the jury to disregard the reference given in close proximity to the  
13      statement; The Court finds that jury instruction No. 6<sup>2</sup>, approved by  
14      defense counsel, did not conflict with the Court's earlier instruction  
15      to disregard the subject statement. Finally, the Court finds the single  
16      reference to the desire to "plead the Fifth" did not prejudice the  
17      defendant's trial.

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21       <sup>2</sup>Jury Instruction #6 reads: An act is done knowingly if the  
22      defendant is aware of the act and does not act through ignorance,  
23      mistake, or accident. The government is not required to prove that the  
24      defendant knew that his acts or omissions were unlawful. You may  
25      consider evidence of the defendant's words, acts, or omissions, along  
26      with all the other evidence, in deciding whether the defendant acted  
    knowingly.

ORDER. . . - 6

1 **III. Conclusion**

2 The Court concludes that Defendant has failed to set forth facts or  
3 law of a strongly convincing nature to induce this court to reverse its  
4 prior decision or grant Defendant's second request for a new trial.  
5 Accordingly, the Court denies the Defendant's request for reconsideration  
6 of its order denying a new trial and for defendant's renewed request for  
7 a new trial based on newly raised issues in this motion. Moreover, in  
8 the view of the court, the jury conscientiously and carefully performed  
9 its office. The court finds that there was substantial competent  
10 evidence to support the verdict of guilty.  
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12 **Accordingly, IT IS HEREBY ORDERED:**

13 Defendant's Motion to Reconsider Order Denying New Trial (Ct. Rec.  
14 120) filed December 21, 2006 is **DENIED**.

15 The District Court Executive is directed to enter this Order and  
16 forward copies of this Order to counsel.

17 **DATED** this 23rd day of February, 2007.  
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19 ***s/Lonny R. Suko***

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LONNY R. SUKO  
21 United States District Judge  
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